IN THE

Supreme Court of the United States

No. ~~660~~. 208

OCTOBER TERM, 1919.

HIAWASSEE RIVER POWER CO.
Appellant.
vs.
CAROLINA TENNESSEE POWER CO.
Appellee.

REPLY BRIEF OF APPELLANT.

SANDERS MCDANIEL,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

No. ~~669~~. 208

October Term, 1919.

Hiawassee River Power Co.
Appellant.
vs.
Carolina Tennessee Power Co.
Appellee.

Reply Brief of Appellant.

We desire to file this reply brief to the contention made in the brief of attorneys for appellee that there is no Federal question involved in this case and that this Honorable Court therefore has no jurisdiction to consider this appeal. The argument in the brief of counsel for appellee covering this question is contained in pages nine to thirty (both inclusive) of their brief.

On page nine the statement is made that an examination of the record will show that no Federal ques-

tion is in any way or manner involved. The further statements are made that no Federal question is pleaded, that no Federal question was considered or thought of in the trial court in the instructions to the jury, that the assignment of errors on the appeal from the Superior Court of Cherokee County to the Supreme Court of North Carolina will show that no Federal question was thought of, suggested or raised in any manner, and that the opinion of the Supreme Court of North Carolina will show that no Federal question was argued before that Court or considered or decided by that Court, and that no Federal question was in any way "suggested, raised or considered, either in the Trial Court or in the Supreme Court of North Carolina."

Again, on page fourteen of their brief counsel for appellees assert that "an examination of the record in this case will show beyond all question that absolutely no Federal question was at any time suggested, set up, claimed, argued or considered until the same was attempted to be set up by the petition for writ of error on the 17th day of August, 1918, nearly three months after the decision of the case in the Supreme Court of North Carolina."

Again on page fifteen of their brief counsel for appellees assert that they find that "an attempt has been made in the assignments of error to this Court to raise Federal questions. No Federal question was raised or considered either in the Trial Court or in the Supreme Court of North Carolina. The assignments of error on the appeal from the Superior Court of Cherokee County, North Carolina, to the Supreme Court of North Carolina are set out in full on pages 194 to 204, and if any Federal question had been involved in the

case it should have and must have been set up at least in those assignments of error."

On page twenty-nine of their brief counsel for appellees again assert that "no attempt was made either in the Trial Court or in the State Supreme Court to raise a Federal question."

It is difficult for us to understand these statements of counsel for appellee or to reconcile them with the history and record of this case. These counsel have been in this case from its inception and must be familiar with the record.

The first Federal question presented relates to the charter of appellee company. On an appeal to the Supreme Court of North Carolina all proceedings are set out in a "Statement of the Case on Appeal." This "Statement" is the record on appeal.

An inspection of the record on page 52 will disclose that the Federal question presented relative to appellee's charter was raised in the Trial Court when the charter was offered in evidence by appellee. On this page of the record is found the following language:

> "Upon the trial plaintiff (appellee in this Court) offered the following evidence, to wit: Charter of the Carolina Tennessee Power Company; Act of the Legislature incorporating the Carolina Tennessee Power Company, ratified Feb. 16, 1909, being Chapter 76 of the private laws of 1909, marked plaintiff's exhibit No. 1. Copy attached.
>
> "To the introduction of this charter the defendant objected on the ground that same was in terms and effect a monopoly and a void exercise of power by the State Legislature which under-

took to provide it, it being opposed and obnoxious to the bill of rights and the Constitution and in violation of the *Fourteenth Amendment.*"

In this way, by objecting to the introduction of this charter as evidence, the Federal question as to the charter was first presented to the Trial Court and raised in that Court.

After the verdict of the jury in the Trial Court appellant moved for a new trial. One of the grounds of this motion was alleged error in the admission of evidence by the Trial Court. (See judgment of Trial Court overruling motion for new trial on page 50 of record). This motion again involved the Federal question made against the admission of this charter of appellee in evidence. The denial of its motion for new trial upon the grounds stated is set out in the "Statement of case on Appeal" (page 193 of the record). To this denial exception was taken by appellant.

The first "assignment of errors" from the Trial Court to the Supreme Court of North Carolina related to the error of the Trial Court "in admitting in evidence, *over the defendant's objection,* the charter of the Carolina Tennessee Power Company (appellee). (Page 194 of the record.) It is submitted that the Federal question as to appellee's charter was properly made in this assignment of error. Error was alleged that it was admitted "over the defendant's objection," that objection, as shown in the "Statement of the case on appeal," being based upon the assertion that this charter was opposed to the Fourteenth Amendment.

In the printed briefs filed by appellant in the Supreme Court of North Carolina every contention and

every Federal question relative to this charter presented in the briefs in this Court were presented. We realize that this Court may not refer to the briefs filed in the Supreme Court of North Carolina to ascertain whether a Federal question was presented in that Court. We will, however, file with the Clerk of this Court a copy of that brief and would be glad if this Court might refer to it in verification of our statement that in that brief the same questions were presented and argued relative to appellee's charter as are here presented.

In the opinion of the Supreme Court of North Carolina in this case it will be seen that our contentions relative to that charter, embracing the Federal questions here presented, were considered and that that Court decided against them.

In that opinion, on page 276 of the record, the Court says:

> "The defendant has assailed the charter of the plaintiff, as being *unconstitutional* and *invalid.*"

Following this statement the Court in its opinion (pages 276, 277, 278 and 279 of the record) discusses the points made against plaintiff's charter and decides them adversely to appellant's contentions. On page 278 of the record the Court in its opinion discusses the effect of the Fourteenth Amendment upon the charter of appellee, and concludes on page 279 with the statement:

> "There is therefore no wrong done to the defendant, and no violation of its constitutional rights. The legislation is neither *partial nor discriminatory.*"

It will thus be seen that the Federal questions presented in this Court relative to the unconstitutionality of appellee's charter were made in the Trial Court and in the Supreme Court of North Carolina, and were decided by the latter Court.

This Court, in considering the question as to whether a Federal question was presented in the Court below, will consider the question presented in the "Statement of case on appeal" from the Trial Court to the Supreme Court, the same question presented in the "Assignments of Error" from the Trial Court to the Supreme Court, and the opinion of the Supreme Court of North Carolina, as parts of the record in those Courts and in this Court on appeal.

In presenting the Federal question relative to appellee's charter, appellant followed the rules of practice of the Supreme Court of North Carolina. This rule is stated on page 17 of appellee's brief. As required by this rule "Statement of case on appeal" was made reserving the exception relative to appellee's charter, and the same exception was set forth as appellant's exception number one in the assignment of errors to the Supreme Court of North Carolina. In this way this question was made a part of the record both in the Trial Court and in the Supreme Court of North Carolina, and is rightly presented as a part of the record on the appeal in this Court.

That the Federal question relative to appellee's charter was made clearly appears from the opinion of the Supreme Court of North Carolina, and by rule of the Court the opinion of the State Court is now a part of the record and will be considered by this Court "for the purpose of ascertaining whether either party claimed, in proper form, that a State law, upon which

some of the issues depended, was in contravention of the Constitution of the United States."

Loeb vs. Columbia Township Trustees, 179 U. S., 472, 483.

Sayward vs. Denny, 158 U. S., 180, 181.

United States vs. Taylor, 147 U. S., 695, 700.

We recognize that this Court will not entertain jurisdiction of a case unless a Federal question is involved, is properly presented, and a decision upon it was necessary to the judgment rendered.

We respectfully submit that this case contains all of these elements. A Federal question relative to appellee's charter is involved, it was and is properly presented, a decision was made upon it, that decision was adverse to appellant, and was necessary to the judgment rendered.

The attack upon appellee's charter went to the vitals of appellee's rights. If appellee had no valid charter it had no rights. The judgment sustaining its charter decided the Federal question made and was decisive of appellee's rights in the present action.

This Federal question was raised in the Trial Court and in the Supreme Court and decided by the Supreme Court. This being true, it is immaterial how it was raised, and under the decisions of this Court, having been raised and decided by the State Supreme Court, it comes within the jurisdiction of this Honorable Court and will be reviewed by it.

> "If the Supreme Court of the State treated Federal questions as necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result it did reach, it becomes immaterial to consider how they were raised."

Miedrich vs. Lauenstein, 232 U. S., 236, 243.
North Carolina R. R. Co., vs. Zachary, 232 U. S., 248, 257.
Mallinckrodt Works vs. St. Louis, 238 U. S., 41, 49.
Cissna vs. Tennessee, 246 U. S., 289, 294.

By reason of the facts as to this Federal question as disclosed by the record, it is respectfully submitted that under the law this case is reviewable by this Honorable Court and should not be dismissed.

Respectfully submitted,

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Attorneys for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 208

HIAWASSEE RIVER POWER COMPANY,
PLAINTIFF IN ERROR,

V.

CAROLINA-TENNESSEE POWER COMPANY,

DEFENDANT IN ERROR.

BRIEF OF

MARTIN, ROLLINS & WRIGHT,

Counsel for Defendant in Error.

STATEMENT OF FACTS

1. PARTIES ON THE RECORD.

Attention is called to the fact that in the brief for Plaintiff in Error, and, in fact, throughout the brief, the Carolina-Tennessee Power Company, Defendant in Error, is referred to as "plaintiff" and the Hiawassee River Power Company, Plaintiff in Error, is referred to as "defendant." No doubt this was an oversight on the part of counsel.

2. HISTORY OF THE LITIGATION.

The writ of error in this case was sued out by the plaintiff in error, Hiawassee River Power Company, against the defendant in error, Carolina-Tennessee Power Company, to reverse a judgment of the Supreme Court of the State of North Carolina, in favor of the Carolina-Tennessee Power Company, Defendant in Error.

(Record page 1). The judgment sought to be reversed was rendered by the Supreme Court of North Carolina at the Spring Term, 1918, and the opinion was filed by Walker, Justice, May 28, 1918, (record page 270, original page 417; also record page 285). On the 21st day of August, 1914, the Defendant in Error, Carolina-Tennessee Power Company, brought a civil action in the Superior Court of Cherokee County, North Carolina, against the Plaintiff in Error, Hiawassee River Power Company, (record pages 15 to 16). The complaint filed by the Defendant in Error, Carolina-Tennessee Power Company, plaintiff in the Court below, is set out on pages 16 to 21 of the record, and was filed August 21, 1914. The answer of the plaintiff in error, defendant below, Hiawassee River Power Company, is set out on pages 21 to 30, and was filed the 13th day of November, 1914. The reply of the defendant in error is set out on pages 31 to 34 of the record.

Upon this original complaint and the answer and the reply above referred to, the cause was tried in the Superior Court of Cherokee County, North Carolina, at the April Term, 1915, (bottom page 259) and resulted in a judgment in favor of the plaintiff, from which both parties appealed. (Record page 259). These appeals were heard at the Spring Term, 1916, in the Supreme Court of North Carolina, and an opinion was filed by Walker, Judge, March 29, 1916. (Record page 259, 260) wherein a new trial was granted to the Hiawassee River Power Company for errors pointed out in the opinion of the Court, printed in this record on pages 267 to 269. (See Power Co. v. Power Co., 171 N. C., 248). The opinion of the Supreme Court of North Carolina on the first appeal is set out in full in this record, (pages 259 to 269).

After this new trial had been granted the defendant in error, Carolina-Tennessee Power Company, by permission of the Court, filed an amended complaint (record pages 34 to 39). This complaint was filed June 27, 1916. To this complaint the plaintiff in error, defendant below, filed an amended answer (record pages 39 to 45); to the amended answer the plaintiff below filed another answer, or reply (record pages 45 to 47). This last pleading was

filed October 26, 1916. Thereafter at April Term, 1917, the cause came on for hearing again in the Superior Court of Cherokee County, North Carolina (record page 15), and resulted in a verdict and judgment in favor of the defendant in error. The verdict is set out on page 48 of the record and the judgment appealed from on pages 48 to 50. From this judgment the plaintiff in error, Hiawassee River Power Company, again appealed to the Supreme Court of North Carolina (record page 50), and at the Spring Term, 1918, of the Supreme Court of North Carolina the judgment in favor of the defendant in error was affirmed. This judgment of affirmance is set out in the record on page 285. The opinion of the Supreme Court of North Carolina affirming the judgment now sought to be reversed, is set out in full in the record pages 270 to 285.

3. FACTS OF THE CASE.

Defendant in error, Carolina-Tennessee Power Company, is a corporation organized under the laws of the State of North Carolina, by virtue of an Act of the General Assembly of said State, ratified the 16th day of February, 1909, being chapter 76 Private Laws of North Carolina, 1909. This Act of the General Assembly is set out in full in the record (pages 204-214). From this Act it will be seen that the defendant in error is a public service corporation and empowered to supply the public and municipalities with electric current for power, light, heat and other purposes, and is authorized to locate, build, maintain and operate hydro-electric plants on any non-navigable stream in the State of North Carolina, and whenever the lands and waters necessary for the purposes of the Corporation cannot be obtained by purchase, said corporation is authorized, after having surveyed, staked out, and located its public works (record page 209), and filed surveys of the same in the office of the Clerk of the Superior Court in the County in which the land lies (record page 209), to take such lands by condemnation, by paying the value therefor, to be assessed by a jury as provided by law.

In exercising the powers conferred upon the defend-

ant in error by its charter, the defendant in error in the year 1909 surveyed out on the Hiawassee River in Cherokee County, North Carolina, locations for two hydro-electric plants, and on the 21st day of June, 1911, filed in the office of the Clerk of the Superior Court of Cherokee County, plats or maps of said locations as provided by its charter. Thereafter, and before the organization of the Hiawassee River Power Company, the defendant in error began to acquire and did acquire by deeds in fee simple, made to it prior to the commencement of this action, fifty per cent. of the water front along the banks of the Hiawassee River, necessary for its two hydro-electric plants, and had contracts for substantially twenty-five per cent. more of said river frontage, making in all at the commencement of this action seventy-five per cent. of the river frontage held in fee simple and under contract by the defendant in error. (Record page 110). The proposed developments of the defendant in error consisted of two hydro-electric plants situated on the Hiawassee River in Cherokee County, North Carolina, as represented on the plats attached to the record marked Exhibit 7 and Exhibit 7-A, and Exhibit 7-E, between pages 224 and 225. Exhibit 7-A shows the lands and waters surveyed out for the Upper Development on the Hiawassee River. This development contemplated a dam of one hundred and fifty feet in height to be erected at the place marked "dam site" on the plat, and will pond the water back for about thirteen miles. The other development represented by Exhibit 7 was of a similar size and contemplated the erection of a dam on the land marked "Southern Extract Company," near the State line, at the North end of the plat, and which dam was to be about one hundred and fifty feet in height and would back the water almost to the first dam above mentioned. These Exhibits 7 and 7-A are copies of the plats that were filed in the office of the Clerk of the Superior Court of Cherokee County, on the 21st day of June, 1911, as required by law. Exhibit 7-E is a consolidated plat showing both developments. This last plat is on a smaller scale than the other two and the lands marked in red on the plat represent the river frontage and lands owned in fee sim-

ple by the defe- dant in error at the commencement of this action.

The defendant in error immediately after the making of said surveys and locating said public works, by proper corporate action, duly adopted said locations as required by the laws of North Carolina.

4. VERDICT OF THE JURY.

Upon the trial at Spring Term, 1917, in the Superior Court of Cherokee County, all of the facts in dispute in this cause were determined by a jury in favor of the defendant in error, plaintiff below, on issue submitted to the jury under the instructions of the Court, which issues and answers thereto were as follows:

ISSUES

"1. Were the locations for the dams, reservoirs and public works claimed by the plaintiff surveyed and staked out on the Hiawassee River in the year 1909, as alleged in the complaint, and as indicated on the maps offered in evidence by plaintiff, marked Exhibits 7 and 7-A?

Answer: Yes, by consent.

"2. If so, did the plaintiff in the year 1909 and thereafter, but before the organization of the defendant company in July, 1914, adopt said locations by authoritative corporate action, as alleged in the complaint?

Answer: Yes.

"3. Did the plaintiff prior to the commencement of this action, on the 21st day of August, 1914, abandon its said locations and proposed plans as alleged in the answer?

Answer: No.

"4. Did the plaintiff file the maps or plats of its said locations in the office of the Clerk of the Superior Court of Cherokee County on or about June 21, 1911, as alleged in the complaint?

Answer: Yes.

"5. Did the plaintiff on or about the 17th day of August, 1914, by authoritative corporate action, adopt

the surveys and locations for its dams, reservoirs and public works, which had theretofore been made and marked out on the Hiawassee River, as alleged in the complaint?

Answer: Yes. (By consent).

"6. Were the locations for the dams, reservoirs and public works claimed by the defendant surveyed and staked out on the Hiawassee River, as alleged in the answer?

Answer: Yes. (By consent).

"7. If so, did the defendant thereafter by authoritative corporate action adopt said locations, and if so, when?

Answer: No."

Upon this verdict the judgment in favor of the defendant in error was entered in the trial court and this judgment was affirmed on appeal by the Superior Court of North Carolina.

The Carolina-Tennessee Power Company immediately upon its organization on the 28th day of May, 1909, (Exhibit 3, record pages 216 to 220) entered into a contract with the Carolina Construction Company for the building of the dams and the erection of the hydro-electric plants above mentioned, which contract is set out in the record on page 222. The Carolina Construction Company made a contract dated the 13th day of July, 1909, with the Ambursen Hydraulic Construction Company, which contract is set out as Exhibit 14-A (pages 226-230 of the record), whereby the Ambursen Company was to do the necessary surveying, prepare the plans and designs, furnish material, supplies, tools and other things necessary for the construction of said hydro-electric plants. *The defendant in error was proceeding in the regular way to make its proposed development when its work was interfered with by the plaintiff in error, in consequence of which this action was brought.*

5. CLAIMS OF HIAWASSEE RIVER POWER COMPANY.

The Hiawassee River Power Company, plaintiff in error, is a corporation organized under the laws of North Carolina by a certificate issued by the Secretary of State of North Carolina, dated 15th day of July, 1914 (record page 244 to 248). Said Corporation was organized July 15, 1914 (record page 255). Immediately after the organization of said Hiawassee River Power Company, the lands and property claimed by it in this proceeding were conveyed to it by deed dated July 15, 1914 (record pages 248 to 254). Some of the lands claimed by the Hiawassee River Power Company are situated on the Hiawassee River within the basins which would be formed by the dams proposed to be built by the Carolina-Tennessee Power Company, and all the lands bordering on the river were necessary for and included in the proposed developments of the Carolina-Tennessee Power Company. The Carolina Company could not make its developments without overflowing all of the lands bordering on the Hiawassee River so purchased by the Hiawassee Company.

In addition to having purchased the lands referred to, the Hiawassee Company claimed that it had located and proposed to build two hydro-electric plants, one of which it claimed to have located on the Hiawassee River in the lower reservoir of the Carolina-Tennessee Power Company's property, and at a place about three miles above the Carolina Company's lower dam, and the other it claimed to have located in the Carolina Company's upper reservoir, and at a place about three miles above its upper dam. The proposed dams of the Carolina Company would overflow and destroy the dams which the Hiawassee Company claims it intended to build, and it was therefore impossible that both companies could construct their public improvements on the same river practically at the same place.

The jury, however, found by the verdict in this case, and upon ample evidence to sustain it (see 7th issue, record page 48), that the defendant *had not by authoritative*

corporate action adopted said locations as required by law.

At the commencement of this action the Hiawassee River Power Company owned in fee simple three tracts of land with a river frontage of fifty-seven hundred (5700) feet, or 1.08 miles, and had under contract and condemnation proceedings other river frontage, nearly all of which was claimed under contracts and deeds by the Carolina-Tennessee Power Company.

It is thus seen that the controversy in this case in the courts of North Carolina was, which company had the prior right to develop the water power on the Hiawassee River.

The jury to which the cause was submitted found by the verdict that the defendant in error had the prior right to develop these water powers by reason of the acts done by it, and the trial Court rendered a judgment according to the verdict, which judgment was affirmed on appeal to the Supreme Court of North Carolina. The plaintiff in error now seeks to have this judgment reversed.

It is apparent from an examination of the facts appearing in this record that the plaintiff in error has no legal or equitable right to interfere with the proposed developments of the defendant in error and that its acquisition of the properties described in the deed of conveyance of July 15, 1914, six days prior to the commencement of this action, was for the purpose and only for the purpose of holding up or interfering with the proposed developments of the defendant in error.

The defendant in error prior to the commencement of this action had acquired a large portion of the property necessary for its developments and had invested in the lands necessary for its proposed developments and in engineering, surveying and other like expenses, $111,000.00 (Record 57, 110).

ARGUMENT

NO FEDERAL QUESTION INVOLVED

1. There is no Federal Question involved in this cause, and this Honorable Court has therefore no jurisdiction. A most careful examination of the record in this cause will show that no Federal question is in any way or manner involved in the controversy. A reading of the pleadings, which are fully set out in the record, shows that no Federal question was pleaded, raised, or suggested in any way or manner whatsoever by the pleadings. A reading of the instructions of the trial court to the jury (record pages 174 to 190) will show that no Federal question was considered, suggested, or thought of by the trial Court in the instructions to the jury. A reading of the assignments of error on the appeal from the Superior Court of Cherokee County, North Carolina, to the Supreme Court of North Carolina, which assignments of error are set out in the record on pages 194 to 204, will show that no Federal question was thought of, suggested, or raised in any manner whatsoever by counsel for the plaintiff in error on that appeal. A reading of the opinion of the Supreme Court of North Carolina, which is set out in full in the record (pages 270 to 285) will show that no Federal question had been argued before the Court, considered by the Court, or decided by the Court. There is absolutely no Federal question in the case. No statute of the United States, no right arising under a statute of the United States, no part of the constitution of the United States and no right arising under the constitution of the United States was in any way or manner by pleading, motion, request for instruction or in any other way, suggested, raised, or considered, either in the trial court or in the Supreme Court of North Carolina. In fact no such question could have been considered because no such question was involved.

2. The Supreme Court of the United States on writs of error to a State Court will consider only Federal questions.

"But according to the well-settled doctrine of this court with regard to cases coming from State courts,

unless a decision upon a Federal question was necessary to the judgment or, in fact, was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate by itself and which contains no Federal question, the same result must follow as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. Murdock v. Memphis, 20th Wallace 590; Hall v. Akers, 132 U. S., 554."

Arkansas So. RR. v. German Bank, 207 U. S., 270,275.

"It is admitted that the general and well-settled rule is that in a case coming from a State court this court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions."

Leathe v. Thomas, 207 U. S., 93, 98.

"It is enough to refer to Murdock v. Memphis, 20th Wallace, 590, where, after great consideration, it was held that under the judiciary act as amended to its present form this Court was limited to the consideration of the Federal questions named in the constitution. This court, whose highest function it is to confine all other authorities within the limits prescribed by them by the fundamental law, ought certainly to be zealous to restrain itself within the limits of its own jurisdiction, and not be insensibly tempted beyond them by the thought that an unjustified or a harsh rule of law may have been applied by the State Courts in the determining of a question committed exclusively to their care."

Sauer v. New York, 206 U. S., 536, 546-547.

In the case of Presser v. Illinois, 116 U. S., this Court, after stating that the questions involved, arose under the general corporation law of the State of Illinois, says:

"In respect to these points we have to say that they

present no Federal question. It is not, therefore, our province to consider or decide them."

Presser v. Illinois, 116 U. S., 269.
Harding v. Illinois, 196 U. S., 78, 83.

3. JURISDICTION CONSIDERED FIRST.

"In every case which comes to this Court on writ of error or appeal, the question of jurisdiction must first be answered whether propounded by counsel or not."

Giles v. Teasley, 193 U. S., 146, 160.

"Has this Court authority to review the judgment of the Circuit Court of Appeals in this case?

"This question arises upon the face of the record and cannot be ignored; for the rule is well established that, 'On every writ of error or appeal the first and fundamental question is that of jurisdiction, first of this court and then of the court from which the record comes.' M. C. & L. M. Ry. Co. v. Swan, 111 U. S., 379, 382; Kingbridge Co. v. Otoe Co., 120 U. S., 225; Martin v. B. & O. RR. Co., 151 U. S., 673, 690; Powers v. C. & O. Ry. Co., 169 U. S., 92, 98; Great Southern Fireproof Hotel Co., v. Jones, 177 U. S., 449, 453."

Continental National Bank v. Buford 191 U. S., 119, 120.

"The fundamental question of jurisdiction first of this Court and then of the Court from which the record comes presents itself on every writ of error or appeal and must be answered by the court whether propounded by counsel or not."

Defiance Water Co. v. Defiance, 191 U. S., 184, 194.

In the case of M. C. and L. M. R. R. Co. v. Swan, 111 U. S., 382, this honorable court says:

"It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of

the judicial power of the United States, is inflexible and without exception, which requires this court of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

4. RECORD MUST SHOW FEDERAL QUESTION INVOLVED

Harding v. Ill., 196 U. S., 78, 84; Ocean Insurance Co. v. Polleys, 13 Pet., 164; Taylors Jurisdiction and Procedure, Section 242.

5. HOW FEDERAL QUESTIONS MUST BE RAISED

"The proper way is by pleading, motion, exception or other action part or being made part of the record showing that the claim was presented to the Court. Loeb v. Trustees, 179 U. S., 472, 481. It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error; or in the briefs of counsel not made part of the record. Sayward v. Denny, 158 U. S., 180, Zadig v. Baldwin, 166 U. S. 488. The assertion of the right must be made unmistakably and not left to mere inferences."

Oxley Stave Co., v. Butler Co., 166 U. S. 648.

6. FEDERAL QUESTION CANNOT BE FIRST RAISED BY ARGUMENT IN STATE SUPREME COURT

Loeb v. Trustees, 179 U. S., 472, 483.

In the case of Sayward v. Denny, 158 U. S., 180, 183, this Court says:

"As the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under any State was drawn in question it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of the highest court of the State, in which such decision could be had, was against the title, right, privilege or immunity so set up or claimed. And in that regard, certain propositions must be regarded as settled. 1. That the certificate of the presiding judge of the state court, as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below. Powell v. Brunswick County, 150 U. S., 433, 439, and cases cited. 2. That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way. Miller v. Texas, 153 U. S., 535; Morrison v. Watson, 154 U. S., 111, 115, and cases cited. 3. That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment. Loeber v. Schroeder, 149 U. S., 580, 585, and cases cited. 4. That the petition for the writ of error forms no part of the record upon which action is taken here. Butler v. Gage, 138 U. S., 52, and cases cited. 5. Nor do the arguments of counsel, though the opinion of the state courts are now made such by rule. Gibson v. Chouteau, 8 Wall. 314; Parmelee v. Lawrence, 11 Wall. 36; Gross v. U. S., Mortgage Co., 108 U. S., 477, 484; United States v. Taylor, 147 U. S., 695, 700. 6. The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. Hoyt v. Sheldon, 1 Black, 518; Maxwell v. Newbold, 18 How. 511, 515. 7. Or, at all events it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession

of the right must be distinctly deducible from the record before the state court can be held to have disposed of such Federal question by its decision. Powell v. Brunswick County, 150 U. S., 433.

"Tested by these principles it is quite apparent that this writ of error must be dismissed."

Baldwin v. Kansas, 129 U. S., 52, 57.
Maxwell v. Newbold, 18 Howard, 511, 515.

7. FEDERAL QUESTION CANNOT BE RAISED BY PETITION FOR WRIT OF ERROR.

An examination of the record in this case will show beyond all question that absolutely no Federal question was at any time suggested, set up, claimed, argued, or considered until the same was attempted to be set up by the petition for writ of error on the 17th day of August, 1918, nearly three months after the decision of the case in the Supreme Court of North Carolina. The Federal question cannot be raised in this manner.

"It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error."

Mutual Life Insurance Co., v. McGrew, 188 U. S., 291, 308.

"The petition for writ of error forms no part of the record upon which action is taken here. Butler v. Gage, 138 U. S., 52, and cases cited."

Sayward v. Denny, 158 U. S., 180, 183.

In Butler v. Gage, supra page 56, this court says:

"This brings us to consider whether the record before us so presents a Federal question as to justify the maintenance of the writ, and it may be remarked in the outset that the petition for writ of error forms no part of the record upon which action is taken here. Manning v. French, 133 U. S., 186: Clark v. Pa., 128 U. S., 395; Warfield v. Chaffe, 91 U. S. 690."

Johnson v. New York Life Ins. Co., 187 U. S., 491, 495.

8. FEDERAL QUESTION CANNOT BE RAISED FOR THE FIRST TIME IN ASSIGNMENTS OF ERROR TO THIS COURT.

As stated above, the first intimation or suggestion of a Federal question in this case arises in the petition for the writ of error. We next find, upon examination of the record, that an attempt has been made in the assignments of error to this Court (record page 3-6), to raise Federal questions. No Federal question was raised or considered either in the trial court or in the Supreme Court of North Carolina. The assignments of error on the appeal from the Superior Court of Cherokee County, North Carolina, to the Supreme Court of North Carolina, are set out in full on pages 194 to 204, and if any Federal question had been involved in the case it should have and must have been set up at least in those assignments of error.

To attempt to set up such questions in the assignments of error to this Court is too late.

> Cleveland, etc., R. R. Co. v. Cleveland, 235 U. S., 50, 53.

In the case just cited, this Court says: "It is equally well settled that the contention made and passed upon in the State court cannot be enlarged by assignments of error made to bring the case to this court."

No Federal question was raised in the State courts, and the attempt to raise a Federal question in the assignment of errors in this court not only came too late but was palpably non-maintainable. Chapin v. Fye, 179, U. S., 127."

> Mallers v. Trust Co., 216 U. S., 614.
>
> Harding v. Ill., 196 U. S., 78, 84.

"The bill of exceptions shows that the plaintiff in error did not bring to the attention of the trial court that the Act of the State under which the assessment was made, or any of the proceedings, were contrary to the Fourteenth Amendment to the Constitution of the United States, nor did he assign as error on appeal to the Supreme Court that the ruling of the trial court or its judgments enfringed that amendment."

"It is urged that in the writ of error and petition for citation, it is stated that certain rights and privileges were claimed under the Constitution of the United States and that the Supreme Court of the State of Illinois decided against such rights and privileges and it is further urged that the Chief Justice of the Court allowed the writ of error. This is not sufficient."

Hulburt v. Chicago, 202 U. S., 275, 279-280.

"In the case at bar an elaborate assignment of error for the purpose of bringing the case to this court is found in the record, in which many rulings are referred to, which, it is alleged, resulted in deprivation of rights of Federal creation. But it is well settled that the assignments of error made for the purpose of bringing the case to this court cannot be looked to for the purpose of originating a right of review here. This must necessarily follow from the provisions of paragraph 709, which permit a review in this court of rulings concerning claims of Federal right which were set up and denied in the State court. Neither the petition for writ of error in the state court after judgment, nor the assignments of error in this court, can supply deficiencies in the record of the state court, if such exist. Harding v. Illinois, 196 U. S., supra, and previous cases in this court therein cited."

Appleby v. Buffalo, 221 U. S., 529.

"It is hardly necessary to say that the raising of such a question in the assignments of error in this court is not sufficient."

New York Central R. R. Co. v. N. Y., 186 U. S., 269, 273.

9. PROPER TIME TO RAISE FEDERAL QUESTIONS.

The proper time to raise a Federal question is in the trial court, whenever that is required by the State practice.

"The proper time is in the trial court whenever that is required by State practice in accordance with which the highest court of a State will not revise the judgment

of the court below on questions not therein raised. Spies v. Ill., 123 U. S., 131; Jacobi v. Ala., 187 U. S., 133; Layton v. Mo., 187 U. S., 356; Erie R. R. Co. v. Purdy, 185 U. S., 148."

Mutual Life Ins. Co. v. McGrew, 188 U. S., 291, 308.

10. The Supreme Court of North Carolina considers no question not set out in exceptions or assignments of error, to rulings of the trial court.

The rules of practice in the Supreme Court of North Carolina provide fully what questions will be considered in that court. Rule 27, 164 N. C., page 548, reads as follows:

"Exceptions.

"27. How assigned:

"Every appellant shall set out in his statement of case served on appeal, his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in the case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exception not thus set out, or filed and made a part of the case or record shall be considered by this court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment."

"We have repeatedly held that cases on appeal in the nature of bills of exceptions are understood to present only such errors as are assigned, and we cannot allow defects to be searched for and made grounds of complaint not contemplated in the appeal."

Davis v. Council, 92 N. C., 725, 731.

"It would be unnecessary to reiterate the rule long and uniformly adhered to which limits the appellate jurisdiction of this court to such exceptions as are shown in the record to have been taken in the court below including

an instruction which lays down a false proposition of law but for the wide range of the argument for the appellant. 'For the best reasons,' remarks Ruffin, C. J., 'it is entirely settled that the Court can take no notice of an error not apparent in the record, that is in the pleadings, verdict, or judgment, unless the appellant except to it at the trial."

Phipps v. Pierce, 94 N. C., 514, 515.

Again, in the same case, the Supreme Court of North Carolina says:

"Only such alleged errors in the proceedings on the trial as the appellant may think proper to assign and set forth therein" can be considered by the State Supreme Court.

Phipps v. Pierce, supra, 516.
Lytle v. Lytle, 94 N. C., 522, 524.
Anthony v. Estes, 99 N. C., 598.

"Error as has been decided in many cases, must be assigned in the case stated or settled on appeal, or in the record of the cause or proceedings in the action, unless the error is apparent in the essential parts of the record as pointed out above."

Thornton v. Brady, 100 N. C., 38, 40.
Wallace v. Robinson, 100 N. C., 206, 210.

"There are no assignments of error in the record as required by rule 27 of this court. The appellant moves to affirm the judgment on that ground and the motion must be allowed, there being no errors apparent on the face of the record proper."

Pegram v. Hester, 152 N. C., 765.

"We must insist upon a strict compliance with the rule, which requires an assignment of the errors relied on in this Court. It is a most reasonable rule, because the appellant is thereby notified of the specific matters which will be involved in the appeal; it enables counsel to prepare their case with greater ease, eliminating all immaterial questions; and, lastly, but by no means the least of all, it places before the Court in condensed form the entire case, so that we can the more readily under-

stand the argument of counsel and consider the case more intelligently, as the discussion before us progresses. But it is sufficient to say that it is the rule of this Court, which was adopted after mature consideration, and is far less drastic or exacting in its requirements than similar provisions in other appellate tribunals, where even an assignment of errors, strictly conforming to our rule, would not be tolerated for a moment. We have more than once held with some degree of emphasis, that this as well as the other rules of the court, will be enforced, reasonably, of course but according to their plain intent and purpose. In this case it seems that the appellant failed to comply with the rules which required the errors, which were pointed out by exceptions, taken during the course of the trial, to be grouped and numbered or assigned in an orderly manner. We are therefore not permitted to consider the able and carefully prepared brief of his counsel, or to enter upon a consideration of the case upon its merits. It is our duty, though under the statute, to examine the record. We have done so, and find no error therein. The appellee moves to affirm the judgment, under the rule as construed by this court, in Davis v. Wall, 142 N. C., 450; Marable v. R. R., 142 N. C., 564; Lee v. Baird, 146 N. C., 361; Thompson v. R. R., 147 N. C., 412; Ullery v. Guthrie 148 N. C., 417. As the case is now presented to us we must allow the motion and affirm the judgment. Affirmed."

Smith v. Manufacutring Co., 151 N. C., 261.

The refusal to give instructions will not be reviewed unless assigned as error.

Davis v. Duval, 112 N. C., 833, 834.
McKinnon v. Morrison, 104 N. C., 354, 361.

11. FEDERAL SUPREME COURT WILL NOT REVIEW QUESTIONS OF FACT.

All of the questions of fact and issues of fact in this case were found by the jury in the trial court in favor of the defendant in error and against the contentions of the plaintiff in error. As before shown no Federal question was raised in the State Supreme Court, therefore there

is no question for this court to consider. This court on writs of error to State Supreme Courts confines its rulings to questions of law only.

"In cases coming from a State court we do not review questions of fact but accept the conclusions of the State tribunals as final."

Chrisman v. Miller, 197 U. S., 313, 319.

"It is the settled rule that this Court in an action at law at least, has no jurisdiction to review the conclusions of the highest Court of a State upon questions of fact. Riverbridge v. Kas. Pac. R. R. Co., 92 U. S., 315; Dower v. Richards, 151 U. S., 658; Israel v. Arthur, 152 U. S., 355; Noble v. Mitchell 164 U. S., 367; Herrick v. Acheson, etc., R. R. Co., 167 U. S., 673, 677; Turner v. N. Y., 168 U. S., 90, 95; Egan v. Hart, 165 U. S., 188."

Clipper Mining Co. v. Eli Mining Co, 194 U. S., 220, 222.

"On error, however, to a State court, this court cannot reexamine the evidence and when the facts are found below is concluded by such finding."

Egan v. Hart, 165 U. S., 188, 189.

"The case was submitted upon oral arguments and elaborate briefs and a voluminous record. It was argued, in many respects, as though this were a proceeding in error to review the weight of the evidence adduced in the state courts, to reexamine the rulings of the court upon the admissibility of testimony, and to determine the effect of the statute of limitations in the state.

"The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709 Rev. Stat. U. S. Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the

State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. Quimby v. Boyd, 128 U. S., 488; Egan v. Hart, 165 U. S., 188; Dower v. Richards, 151 U. S., 658; Thayer v. Spratt, 189 U. S., 346. We shall not, therefore undertake to follow counsel in the consideration of all the questions argued but shall limit our review to questions of a Federal nature which we deem to be properly made in this record and essential to the decision of the case."

Waters-Pierce Oil Co. v. Texas, 212 U. S., 97.

The verdict of the jury settles all questions of fact. In Mo., Kan., etc., R. R. Co. v. Haber, 169 U. S., 613, 639, it is said: "Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury and this court can only consider whether the statute as interpreted to the jury was in violation of the Federal constitution."

Smiley v. Kan., 196 U. S., 447, 453.

"The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California, is that its decision in matter of fact was erroneous and contrary to the weight of evidence in the case. But to review the decision of the state court upon the question of fact is not within the jurisdiction of this Court."

Dower v. Richards, 151 U. S., 658, 663.

12. WHEN DECISION FOUNDED UPON STATE OR LOCAL QUESTION WRIT OF ERROR DISMISSED.

"It is manifest no Federal question was passed on by the Court. Its decision was put upon an independent ground, involving no Federal question, and of itself sufficient to support the judgment."

White v. Leovy, 174 U. S., 91, 95.

"In Remington Paper Company v. Watson, 173 U. S.,

443, we had occasion to repeat and affirm the rule announced in Eustis v. Bowles, 150 U. S., 361, 366-367."

White v. Leovy, 174 U. S., 91, 95.

Chicago & N. W. Ry. Co. v. Chicago, 164 U. S., 454, 457.

13. WHERE A CASE TURNS ON NON-FEDERAL QUESTION, WRIT OF ERROR MUST BE DISMISSED.

It is settled law that to give this court jurisdiction of the writ of error to a State Court it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or constitution, or that the judgment as rendered could not have been given without deciding it."

Eustis v. Bolles, 150 *U. S.,* 361, 366.

"*It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to* the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented. Eustis v. Bolles, 150 U. S., 361."

California Powder Works v. Davis, 151 U. S., 393.

Holden Land Co. v. Interstate Trading Co., 233 U. S., 536, 541.

Leathe v. Thomas, 207 U. S., 93, 98-99.

Giles v. Teasley, 193 U. S., 146, 160.

Rogers v. Jones, 214 U. S., 196, 202.

"We need not, however, consider this contention. For since the Supreme Court rested its judgment upon a non-federal ground, adequate to support it, the existence of a Federal question is of no significance. Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S., 300. (303); and, besides, the attempt to raise it comes too late. St. Louis and San Francisco R. R. Co. v. Shepard, 240 U. S., 240."

Bilby v. Stewart, 246 U. S., 255, 257.

14. GRANTING OF WRIT OF ERROR BY CHIEF JUSTICE OF STATE SUPREME COURT IS NOT SUFFICIENT TO SHOW FEDERAL QUESTION INVOLVED

"It is urged that in the writ of error and petition for citation, it is stated that certain rights and privileges were claimed under the Constitution of the United States, and that the Supreme Court of the State of Illinois decided against such rights and privileges, and it is further urged that the Chief Justice of the Court allowed the writ of error. This is not sufficient."

Hulburt v. Chicago, 202 U. S., 275, 280.
Marvin v. Trout, 199 U. S., 212, 223.
Louisville and Nash. R. R. Co. v. Smith, 204 U. S., 551, 561.

In the case of Marvin v. Trout, supra, it is said:

"It is well settled in this court that a certificate from a presiding judge of the State Court made after the decision of the case in that court, to the effect that a Federal question was considered and decided by the Court, adversely to the plaintiff in error, cannot confer jurisdiction on this Court where the record does not otherwise show it to exist; that the effect of such a certificate is to make more certain and specific what is too general and indefinite in the record itself, but it is incompetent to originate the Federal question."

Dibble v. Bellingham Bay Land Co., 163 U. S., 63;
Hinkle v. Cincinnati, 177 U. S., 170;
Fullerton v. Texas, 196 U. S., 192.

15. STATE COURTS DETERMINE POWERS OF STATE CORPORATIONS.

A great deal is said in the brief of the plaintiff in error in this case about the franchise, powers and rights of the Carolina-Tennessee Power Company, defendant in error. It is well settled that it is solely the province of State courts to determine the power of State corporations concerning all local matters.

In Taylor on Due Process of Law, Section 428, we find the rule states as follows:

"Domestic corporations are the creatures of the State, and the State has clear right to regulate its own creations. The power of classification upheld by the Supreme Court admits of discriminations between domestic corporations and also between foreign corporations."

"Again, the decision by a state court of the extent and limitation of the powers conferred by the State upon one of its own corporations is of a purely local nature. In creating a corporation a State may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike. In granting corporate powers the legislature may deem that the best interests of the State would be subserved by some restriction, and the corporation may not plead that in spite of the restriction it has more or greater powers because the citizen has. 'The granting of such right or privilege (the right or privilege to be a corporation) rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as the legislature may judge most befitting to its interests and policy.' Home Ins. Co. v. New York, 134 U. S., 594, 600; Perrine v. Chesapeake & Delaware Canal Co., 9 How. 172, 184; Horn Silver Mining Co. v. New York 143 U. S., 305-312."

Berea College v. Kentucky, 211 U. S., 45, 54.

This Court in the case of Home Insurance Co. v. New York, 134 U. S., 599, says:

"The right or privilege to be a corporation or do business as such body, is one generally deemed of value

to the corporators or it would not be sought in such numbers as at present. It is the right or privilege by which several individuals may unite themselves under a common name and act as a single person with a succession of members without dissolution or suspension of business, and with a limited individual liability. The granting of such rights or privileges rests entirely in the discretion of the State, and of course, when granted may be accompanied with such conditions as its legislature may adjudge most befitting to its interest and policy."

"The granting of rights and privileges which constitute the franchise of the corporation being a matter resting entirely within the control of the legislature to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interest and policy."

Horns Silver Mining Co. v. N. Y.,143 U. S., 305, 313.

Chicago Life Ins. Co. v. Needles, 113 U. S., 574, 579, 580.

In a case before this Honorable Court there was a contention made that by certain acts of the Legislature of the State of Kentucky, a corporation had not been created. This Court said: "Counsel criticised this ruling severely asserting that corporations are never created by implication and that there is in the Acts of 1869, in terms, no attempt to create one. But this is a matter of a purely local nature. A corporation may be formed in any manner that a State sees fit to adopt, and when the highest court of a State decides that by certain legislation a corporation has been created, such decision concludes not only the courts of the State but also those of the United States. It is a matter over which we have no review, and in respect to which the decision of the State Court is final."

Hancock v. Louisville R. R., 145 U. S., 409, 415.

Again, in the case of Chicago B. & Q. R. R. Co. v. Ill., 200 U. S., 561, which was a case involving the police power and due process of law, it was held that a State's police power embraces regulations framed to promote

the public convenience or the general prosperity as well as those designed to promote the public health, the public morals, or the public safety. In that case the Court said: "We hold that the police power of the State embraces regulations designed to promote the public convenience or the general prosperity, as well as the regulations designed to promote the public health, the public morals, or the public safety. Lakeshore and M. S. R. R. Co. v. Ohio, 173 U. S., 285, 292; Gilman v. Phil., 3rd Wallace, 713, 729; Pound v. Turck, 95 U. S., 459, 464. Hannibal and St. J. R. Co. v. Husen, 95 U. S., 470."

Bacon v. Walker, 204 U. S., 311.

16. CASES EXACTLY IN POINT.

In two cases which heretofore came to this court, many of the questions herein discussed have been expressly and directly decided. The question of jurisdiction has been decided, and also the questions raised by the brief of the plaintiff in error as to the powers of State corporations and also as to the right of one corporation to acquire priority by appropriation in the utilization of a water power. The case of Telluride Power Transmission Co. v. Rio Grande, etc., Railway Co., 175 U. S., 639, is exactly in point in this controversy. The case referred to was exactly like our case, and brought for substantially the same purpose. In discussing this case we will refer to the plaintiff in error in the case as the "Power Company," and the defendant in error as the "Railway Company."

The action was brought in one of the State courts of Utah by the Railway Company against the Power Company to confirm and quiet the title and right of the Railway Company to build and operate a railway in Provo Canyon, Utah. The Railway Company had surveyed the location of its railroad through this canyon, and alleged that the Power Company had set up an adverse claim to the land over which the railway had been located.

It further appeared that the Power Company was a corporation organized under the laws of Colorado and

claimed that in 1894 it had entered upon Provo Canyon, made surveys and located a dam and had appropriated the land in controversy for the use of a reservoir for waterpower purposes; that it had located a dam which would overflow the right of way claimed by the Railway Company. The Power Company claimed that it had made its location prior to the time the railway company had located. In the opinion of the Court the facts are stated as follows, (page 641):

"The case was tried by the Court without a jury. Findings of fact and conclusions of law were made by the Court to the effect that the plaintiff (Railway Company) had prior possession of the land, and that the adverse claim of the defendants (Power Company) was unfounded. A judgment was thereupon entered in favor of the plaintiff; its title to the lands in question confirmed and quieted; the adverse claim adjudged invalid, and the defendants enjoined from setting up claims or exercising rights adverse to those of the plaintiff. From this judgment defendants, the Telluride Power Company and Nunn, took an appeal to the Supreme Court of Utah, which affirmed the judgment of the District Court, whereupon these defendants sued out a writ of error from this court, assigning, amongst other things, as error, the failure of the district court to remove the case to the Circuit Court of United States."

After disposing of the questions of removal this honorable Court then proceeded to determine the question of the jurisdiction of the court and decided that this court had no jurisdiction of the writ of error. In the discussion of the case this court says further: "But in order to establish any rights under the statute it was encumbent upon the defendants to prove their priority of possession, or, at least, to disprove priority on the part of the plaintiff. The question, *who had acquired this priority of possession was not a Federal question but a pure question of fact upon which the decision of the State Court was conclusive.*" (page 645). (Italics are ours). On examination, the Telluride Power Company case will show that it is exactly in point here.

The right to occupy and use lands along a river were

in dispute. Both parties claimed priority of right; the State courts decided in favor of the Railway Company and *enjoined the Power Company from interference*, and this Court held that no Federal question was involved, although the Power Company claimed its rights under a Federal statute. This was held so because the State courts found that the Power Company had failed to bring itself within the Federal Statute and that such holding was one for the State courts only. Discussing this question, this Court said (page 647): "But the difficulty in this case is that before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws and decisions. *These were local and not Federal questions.* The jurisdiction of this Court in this class of cases does not extend to questions of fact or of local law which are merely preliminary to or the possible basis of a Federal question."

Another phase of the same controversy was presented to this Court in the case of Telluride Power Company v. Rio Grande Railroad Company, reported in 187 U. S., at page 569. This case was an action by the Railway Company to condemn lands claimed by the Power Company. The case proceeded to judgment in favor of the Railway Company, and against the Power Company condemning the identical land over which it was decided, in the case reported in 175 U. S., at page 639, that the Railway Company had a prior right of appropriation. The Court again passes upon several of the questions involved in the controversy now before the Court, and following the decision in the previous case, held that it had no jurisdiction and dismissed the writ of error.

The defendants in the State Court claimed a violation of the Fourteenth Amendment and a deprivation of the rights of the plaintiff in error thereby, but this Court says that it appeared for the first time in the petition for writ of error from this Court, that the defendants claimed such Federal right, and further held as follows (page 584): "But their rights under that section (section 2339

Revised Statutes of U. S.) depended upon questions of fact and questions of local law. The questions of fact were found against plaintiff in error and the question of local law we cannot revise." The writ of error was therefore dismissed.

17. THIS WRIT OF ERROR SHOULD BE DISMISSED.

Under the foregoing authorities this writ of error should be dismissed for many reasons, summarized as follows:

First, no Federal question was involved in the controversy in the State trial court nor in the State Supreme Court, nor is involved in the case now. The questions raised by the pleadings, the questions determined by the jury, and the decisions upon law, are all purely local questions and are not subject to be reviewed in this court.

Second, no attempt was made either in the trial court or in the State Supreme Court to raise a Federal question.

Third, it is too late to raise a Federal question by a petition for writ of error, or by assignments of error.

Fourth, the fact that the Chief Justice of the State Supreme Court certified that Federal questions were involved does not help out a defective record.

Fifth, the decision of the State Supreme Court in this case considered no Federal question or Federal right, and the assignments of error in the State Supreme Court raised no Federal question, and under the North Carolina State practice no error will be considered in the Supreme Court of North Carolina which was not properly assigned. (Rule of Practice 27 hereinbefore set out). The practice as to exceptions in the State Supreme Court is summarized in the case of Taylor v. Plummer, 105 N. C., at page 56, and may be stated as follows:

"1. Exceptions to evidence and all matters occurring on the trial, except to the charge of the court, must be noted at the time or they are waived. 2. The charge and refusal to give instructions are deemed excepted to,

though not excepted to at the time. 3. An omission to charge on any point, or to recapitulate any part of the evidence, is not usually ground of exception, unless there was a prayer for instruction asked and refused, or the omission of the evidence was called to the attention of the court at the time. 4. All exceptions, including those to the charge, are deemed abandoned, unless set out by appellant in making up his case on appeal. 5. Errors upon the face of the record proper (as distinguished from errors committed in the progress of the trial), will be corrected without assignment of error."

Clark's N. C. Code of Civil Proceedure.

18. FIRST POINT OF PLAINTIFF IN ERROR.

An examination of the brief for the plaintiff in error beginning page 21, shows that it first takes the position that the charter of the defendant in error is unconstitutional and void. This question was twice presented to the Supreme Court of the State of North Carolina and has been twice passed upon by that Court and that court has held in this identical case on the two hearings in that court that the charter of the defendant in error is valid in all respects and to all intents and purposes, and, as before stated, *the questions involved are certainly questions of local law only.*

Power Co. v. Power Co., 172 N. C., 248.
Power Co. v. Power Co., 175 N. C., 668 (record pages 265-269 and pages 270 to 285).

These decisions of the Supreme Court of North Carolina in this identical case ought to settle all of the questions suggested by the counsel for plaintiff in error under this point. The plaintiff in error first takes the position that the charter of the defendant in error abridged the privileges and immunities of the plaintiff in error and deprived the plaintiff of its property without due process of law. It is pretty hard for us to see how this argument has any application whatsoever to this case. The defendant in error was chartered by an act of the General Assembly of North Carolina passed at its special session in the year 1909 (Private Laws of North Carolina, 1909, Chapter 176). The charter is set out in the

record on pages 204 to 214. At that time the plaintiff in error was not in existence. It had no property and claimed no property on the Hiawassee River in Cherokee County, North Carolina. It was not organized until July, 1914. It acquired no property until after its organization. When it was organized it was organized under the General Laws of North Carolina and was given those powers and only those powers provided for under the general statutes. How is it possible that the organization of a corporation under a special act of the General Assembly of the State in 1909 could deprive another corporation organized under the general laws of the State in 1914 of its property privileges and immunities as suggested in this case? As a matter of fact, as found by the jury the plaintiff in error has never located any public works on the Hiawassee River in Cherokee County, and has never adopted by proper corporate action any such location, and it stands in reference to this controversy, just exactly like any private person owning property along the Hiawassee River would stand, owing to the fact that it never adopted any location for its pretended public works; it is nothing but a property holder and stands exactly on the same footing as every other property holder along the river. The Supreme Court of North Carolina in the opinions above referred to, held that the charter of the defendant in error was valid in all respects.

It insisted that the charter of the defendant in error is invalid because it gives to the defendant in error powers not granted to all other corporations in North Carolina. This certainly does not raise any Federal question, and the question of local law involved has been passed upon by the State Supreme Court and held against the contentions of the plaintiff in error. The Supreme Court says: "We decided before that the charter was a valid exercise of legislative power and especially held that the fact of allowing the plaintiff to engage in private enterprise and to exercise the power of eminent domain would not invalidate it as it could purchase property as it had done for its private purposes and condemn it when necessary for its public or quasi public purposes."

Power Co. v. Power Co., 175 N. C., 676.

The Court further says:

"We considered and decided in the former appeal other objections to plaintiff's charter and to its right to proceed in acquiring riparian and other property rights on the river by means and measures set forth in the case. As far as appears, the defendant does not seem to have any right which is likely to be invaded, as the jury, by the seventh issue, have found that there was no adoption of the locations claimed by it, but we need not dwell on this matter any further, as we are of the opinion that, upon the verdict, the plaintiff is entitled to judgment regardless of this matter, as it is shown thereby that plaintiff has acquired a prior and superior right, especially by that part of it contained in the first, second, third, fourth, and fifth issues, and those issues were answered by the jury upon sufficient evidence to support the findings."

We especially call attention of the Court to the fact that under the constitution of North Carolina there is no requirement whatsoever that all corporations engaged in the same kind of business should have the same powers. In fact, the constitution of North Carolina at the time of the organization of the defendant in error, expressly provided otherwise. Article VIII, Section 1, of the Constitution of North Carolina, reads as follows: "Section 1. CORPORATIONS UNDER GENERAL LAWS. Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature the object of the corporations can not be attained under general laws. All general laws and special acts, passed pursuant to this section, may be altered from time to time, or repealed."

From this section of the Constitution it appears that wherever in the judgment of the Legislature the objects of corporations could not be attained under general laws, the Legislature is empowered to create such corporations by special act. In this instance we have a case where the necessity of a special act was apparent. It was necessary in order to develop the water power on the Hiawassee River that the Company undertaking such development should have power to condemn water powers for the rea-

son that the whole reservoirs contemplated by the defendant in error cover lands and waters which might be water powers, hence, the legislature granted the charter. Besides, whether that were actually true or not, if the Legislature grants a charter to a corporation, then it is an exercise of legislative discretion and the charter cannot be attacked on the ground that the legislature had no right to grant it.

But the plaintiff in error takes the position that the charter of the defendant in error is invalid because it is not permitted to do business in the County of Swain, North Carolina. The lands in controversy in this case lie in Cherokee County. How it could be contended that the Legislature of North Carolina when granting the rights of a public service corporation to do business in one county must grant to such corporation the right to do business in all other counties in the State we are unable to understand. According to the argument of plaintiff in error, when a corporation is authorized to develop a waterpower in one county in North Carolina, it must have such power in all other counties in the State. When a railroad company is authorized to build a railroad from one point in the State to another point in the State, such railroad company must have power to build its railroad in every county in the State and from every point in the State to every other point in the State. When a Telephone company is authorized to do business in one town in the State or in one county in the State, it must be authorized to do business in all the towns and all the counties of the State. Surely this argument would not be made by any one familiar with North Carolina law. As a matter of fact the counties in North Carolina are mere creatures of the Legislature. They are recognized by the constitution of the State, but their boundaries may be changed, enlarged or diminished. They may be created or they may be destroyed by an Act of the Legislature, and are, as before stated, nothing but creatures of the Legislature, and if the argument of plaintiff in error is correct, then the *creature* is greater than the *creator*. "The Legislature at its discretion can abolish counties, Mills v. Williams, 33 N. C., 558, and of course, cities and

towns, Lilly v. Taylor, 88 N. C., 489, Meriwether v. Garrett 102 U. S., 472; and also all other corporations, Constitution, Article VII, Section 12, and Article VIII, Section 1, since they are all alike creatures of its will and exist only at its pleasure."

Ward v. Elizabeth City, 121 N. C., 1, 3.

"From the formation of our State government, the General Assembly has, from time to time, changed the limits of counties and has over and over again, made two counties out of one, so that, in many instances, even the name of the old county has been lost; and it would seem to an unsophisticated mind, that, where there is the power to make two out of one, there must be the corresponding power to make one out of two. In other words, as the legislature has, undoubtedly, the power to divide counties, where they are too large, that there is the same power to unite them, when they are too small: The power in both cases being derived from the fact, that by the Constitution "all legislative power is vested in the General Assembly," which necessarily embraces the right to divide the State into counties of convenient size, for the good government of the whole. Political and other collateral considerations are apt to connect themselves with the subject of corporations, and thereby give it more importance than it deserves as a dry question of law; and the unusual amount of labor and learning, bestowed on it, has tended to mystify rather than elucidate the subect. Divested of this mystery, and measured in its naked proportions, a corporation is an artificial body, possessing such powers, and having such capacities as may be given to it by its maker. The purpose in making all corporations is the accomplishment of some public good. Hence, the division into public and private has a tendency to confuse and lead to error in the investigation; for, unless the public are to be benefitted, it is no more lawful to confer "exclusive rights and privileges" upon an artificial body, than upon a private citizen."

Mills v. Williams, 33 N. C., 560.

"Article VII, Constitution of North Carolina.

"Section 1. County Officers. In each county there shall be elected biennially by the qualified voters thereof,

as provided for the election of members of the general assembly, the following officers: A treasurer, register of deeds, surveyor, and five commissioners.

"Section 2. Duty of county commissioners. It shall be the duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes and finances of the county, as may be prescribed by law. The register of deeds shall be, ex-officio, clerk of the board of commissioners.

"Section 3. Counties to be divided into districts. It shall be the duty of the commissioners first elected in each county to divide the same into convenient districts, to determine the boundaries and prescribe the name of the said districts, and to report the same to the general assembly before the first day of January, 1869.

"Section 4. Townships have corporate powers. Upon the approval of the reports provided for in the foregoing section by the general assembly, the said districts shall have corporate powers for the necessary purposes of local government, and shall be known as townships.

"Section 5. Officers of townships. In each township there shall be biennially elected, by the qualified voters thereof, a clerk and two justices of the peace, who shall constitute a board of trustees, and shall, under the supervision of the county commissioners, have control of the taxes and finances, roads and bridges of the townships, as may be prescribed by law. The general assembly may provide for the election of a larger number of the justices of the peace in cities and towns, and in those townships in which cities and towns are situated. In every township there shall also be biennially elected a school committee, consisting of three persons, whose duty shall be prescribed by law.

"Sec. 6. Trustees shall assess property. The township board of trustees shall assess the taxable property of their townships and make return to the county commissioners for revision as may be prescribed by law. The clerk shall be, ex officio, treasurer of the township.

"Sec. 7. No debt or loan except a majority of voters. No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.

"Sec. 8. No money drawn except by law. No money shall be drawn from any county or township treasury, except by authority of law.

"Sec. 9. Taxes to be ad valorem. All taxes levied by any county, city, town or township shall be uniform and ad valorem upon all property in the same, except property exempted by this constitution.

"Sec. 10. When officers enter on duty. The county officers first elected under the provisions of this article shall enter upon their duties ten days after the approval of this constitution by the congress of the United States.

"Sec. 11. Governor to appoint justices. The governor shall appoint a sufficient number of justices of the peace in each county, who shall hold their places until sections four, five, and six of this article shall have been carried into effect.

"Sec. 12. Charters to remain in force until legally changed. All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution.

"Sec. 13. Debts in aid of the rebellion not to be paid. No county, city, town or other municipal corporation shall assume to pay, nor shall any tax be levied or collected for the payment of any debt, or the interest upon any debt, contracted directly or indirectly in aid or support of the rebellion.

"Sec. 14. Powers of general assembly over municipal corporations. The general assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article and substitute others in their place, except sections seven, nine and thirteen."

It will be seen from the foregoing sections of the

Constitution of North Carolina that the General Assembly of North Carolina has complete and unlimited control over counties with the single exceptions mentioned in sections 7, 9 and 13.

Attention is called to the fact that all of the decisions bearing on these questions set out in the brief of the plaintiff in error are decisions taken from States other than North Carolina where they have any bearing on the question, and clearly arising under constitutions different from that of North Carolina. Besides, this argument of the plaintiff in error is completely answered by the decision in this identical case now sought to be reviewed. The Supreme Court of North Carolina said (record page 276), Power Company v. Power Company, 175 N. C., 676, that the Legislature had the right to grant the power of eminent domain to one public service corporation without making such grant to all other public service corporations. That such grants were constitutional because they were given in consideration of public service. "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

Constitution of N. C., Article I, Sec. 7.

In Re. Spease Ferry, 138 N. C., 219, 220.

In the Spease case the Court, discussing the power of the General Assembly of North Carolina to pass a statute authorizing the establishment of a public ferry across a river and forbidding any other person to establish a ferry within a limited distance, says: "There can be no question as to the power of the General Assembly to pass this statute." (Page 220). Again, on page 221, the Court says: "Constitutional provisions against the granting of monopolies do not apply to the granting of such franchises and the grant may be exclusive at the pleasure of the legislature."

Again, the plaintiff in error takes the position that the charter of the defendant in error is void for the reason that the thirty days notice required by Article II, Section 12 of the Constitution of North Carolina had not been given. In the first place, it is presumed that the

notice was given before the passage of the Act by the General Assembly. There is no evidence in the record that such notice was not given. It is therefore presumed that it was given. In the second place, as has often been decided by the Supreme Court of North Carolina, and was decided in this identical case (record page 276), no such point can be raised collaterally.

Plaintiff in error further takes the position that the charter of the defendant in error is void because, as it alleges, the defendant in error was not required to file the maps of its locations but was merely required to "deposit" the same in the office of the Clerk of the Superior Court in the County where the land lies.

In the plaintiff's brief (page 37) we read: "The alleged Special Act is vicious class legislation and not the law of the land, and is violative of the Federal Constitution because it attempts to grant to appellee the right to pre-empt and condemn property by methods unknown to the forms of law, in that it allows it merely to "deposit" its surveys in the office of the Clerk of the Superior Court; whereas, other corporations and individuals in order to acquire priority of title to property or to give notice, are required either to register their conveyances or to file notice of lis pendens."

This statement is neither true in fact nor correct in law. The charter of the defendant in error (see record page 209, Section 8) provides for the deposit of the surveys of its public works in the office of the Clerk of the Superior Court of the County where the land lies, and then says, "That such locating of its works and *filing* of its surveys in the office of the Clerk of the Superior Court" shall have certain effects. The trial Judge in construing this charter instructed the jury (record 184) that the statute meant "filing" of the plat. So the argument of the plaintiff falls to the ground as being untrue. In fact, so far as this case is concerned, the law required the filing of the plat. In addition to this, attention is called to the fact that plaintiff in error and other electric power companies in North Carolina organized under the general law, are not required to file or deposit any plats or surveys of their works. Revisal of North Carolina,

1905, Section 1573, quoted in pl aintiff's brief at page 114, reads as follows: "Provided, further, that it shall not be necessary for the petitioner to make any survey of or over the right of way, nor to file any map or survey thereof, nor to file any certificate of the location of its line by its Board of Directors."

If there were anything in the argument of the plaintiff in error that the laws must be uniform and a statute cannot cast more burden upon one corporation than it does upon another, then the defendant in error would not be required to file the plats and surveys of its locations; but, of course, there is nothing in this argument in any event. It is perfectly plain under all the decisions of the Supreme Court of North Carolina and under the authorities generally, that a State Legislature may grant certain powers to one public service corporation without granting similar powers to all other such corporations. See Power Company v. Power Company, 175 N. C., 676-679 (record page 276-279). In this case the Supreme Court of North Carolina, discussing the validity of the charter of the defendant in error, said: *"In our case there is nobody competent to raise the questions as the jury have found that defendant has no vested interest to be impaired, not having adopted any plan of improvement and no condemnation of property having been attempted by the plaintiff, and no one in the accepted territory being a party to the suit. There is, therefore, no wrong done to the defendant, and no violations of its constitutional rights. The Legislature is neither partial nor discriminatory."*

The other questions concerning the validity of the charter of Carolina-Tennessee Power Company, under the Constitution of North Carolina, are so fully answered by the opinion of the Supreme Court of North Carolina in this case that we do not feel called upon to discuss them any further but will cite a few cases bearing on the subject.

Plaintiff in error insists that the charter of the defendant in error is unconstitutional and void and violates the Constitution of the United States, because the defendant in error is granted powers different from those

conferred upon like corporations by the general laws of North Carolina.

"The general laws of the State apply to a corporation organized under a special act so far *only* as the former are consistent with the latter."

Cook on Corporations, 7 Ed., Vol. I, Sec. 2, p. 5.

It has been held that the provisions of the General Statutes relative to corporations are not applicable to a special charter so far as the provisions of the special charter are inconsistent with those of the general statutes.

Hollis v. Drew, etc., Seminary, 95 N. Y., 166-174.
LeFevre v. Lefevre, 59 N. Y., 434.
Clarkson v. Hudson River, 49 N. Y., 455.

The same was held by the Supreme Court of North Carolina in this identical cause.

Power Co. v. Power Co., 171 N. C., 248, 255.

A railroad company which has rights granted to it by its charter may exercise those rights in the manner and for the purpose set out in the charter.

Railroad v. Railroad, 161 N. C., 531.
Atlanta, etc., R. R. v. So. Ry., 131 Fed., 657.

The Legislature may exempt corporations or particular corporations from the operation of general laws provided no constitutional provision is in the way.

Clark & Marshall on Corporations, page 383, Ed. of 1903, Section 127-B.
See also Edition of 1901, pages 107, 174.
Howland v. Myer, 3rd N. Y., 290.
Wood v. Wellington, 30 N. Y., 218.

In this last case it is said (page 223):

"These acts were passed subsequent to the revised statutes and so far as they prescribe a rule for the transfer of paper held by the Company different from that declared by the revised statutes, that must be deemed to overrule the former law."

"The well settled rule of construction where contradictory laws come in question, is that the law general must yield to the law special."

Noys Maxims, 19.
State v. Clark, 25 N. J. Law, 54.

A later private act repeals a previous public act *pro tanto*, McGarvick v. State, 30 N. J. Law, 510; Township of Harrison v. Supervisors, 117 Mich., 215.

The Supreme Court of North Carolina in discussing this doctrine says of a general statute, "But it is still in force except so far as it comes in conflict with or is repugnant to subsequent legislation. It is repealed on this ground so far as it relates to the University Railroad."

Hollaway v. Railroad, 85 N. C., 452, 455.

Where the charter of a railroad, plaintiff in a case, prescribed a different method for assessing damages to lands from that prescribed by the Code, which was passed subsequent to the charter of the plaintiff would prevail.

N. S. Ry. Co. v. Ely, 95 N. C., 77.

Besides it has been often held by the courts that legislation which has for its object the carrying out of a public purpose is not discriminatory if within the sphere of its operation it affects alike all persons similarly situated.

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the Fourteenth Amendment: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application if within the sphere of its operation it affects alike all persons similarly situated, is not within the amednment. 113 U. S., 27, 32."

Hayes v. Missouri, 120 U. S., 68, 71.

In the decision of this case the Supreme Court of North Carolina, 175 N. C., 68, 678 to 679 (record page 278) will be found, with full citations of authorities, a clear, comprehensive and complete statement of the doctrine in question, as follows:

"In Mugler v. Kansas, 123 U. S., 623, the Court said in regard to the extent and operation of the Fourteenth Amendment upon local laws: 'But this Court has declared upon full consideration in Barbier v. Connolly, 113 U. S., 27, that the Fourteenth Amendment has no such effect. After observing, among other things, that the amendment forbade the arbitrary deprivation of life and liberty, and the arbitrary spoilation of property, and secured equal protection to all under like circumstances in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the Court said: "But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity," which was quoted with approval by this Court in S. v. Moore, 104 N. C., p. 721, 722.

"And Judge Cooley says in his work on Const. Limitations (7 Ed.) at p. 555: 'The authority which legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality or the prevailing public sentiment in that section of the State may require or make acceptable different police regulations from those demanded in another, or call for different taxation and a different application of the public moneys. The Legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State Constitution does not forbid. These discriminations are made constantly, and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle.'

"And in the same work, at p. 554, Note 2, it is said: 'To make a statute a public law of general obligation, it

is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the territorial limits described in the act,' citing S. v. County Commissioners of Baltimore, 29 Md., 516; Pollock v. McClurkin, 42 Ill., 370; Haskel v. Burlington, 39 Iowa, 232; Unity v. Burrage, 103 U. S., 447.

"This doctrine was approved by this Court in S. v. Moore, supra. The power to restrict legislation affecting public interests to certain localities was discussed and asserted in S. v. Barrett, 138 N. C., 630, the Court remarking that it had been so long and in so many instances recognized that it was not deemed necessary to re-examine the grounds upon which it rests."

See also State v. Perley, 173 N. C., 783, and Perley v. State of N. C., 39 S. C. Rep. 357, 249 U. S., p——.

It has been often held by this Court that no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit.

Chicago and A. R. Co. v. Tranbarger, 238 U. S., 67 and cases cited.

The police power of a State may be used to promote public conveniences and general prosperity.

Chicago D. & Q. R. Co. v. Ill., 200 U. S., 561, wherein this Honorable Court says:

"The learned counsel for the railway company seem to think that the adjudications relating to the police power of the State to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals, or the public safety. Hence, he presses the thought that the petition in this case does not in words suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district and make them tillable or fit for cul-

tivation. We can not assent to the view expressed by counsel. We hold that the police pwer of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. Lake Shore & M. S. R. Co. v. Ohio, 173 U. S., 285, 292; Gilman v. Philadelphia, 3 Wall. 713, 729; Pound v. Turck, 95 U. S., 459, 464; Hannibal & St. J. R. Co. v. Husen, 95 U. S., 470.' See to the same effect, Bacon v. Walker, 204 U. S., 311, governing Brown v. Walling, 204 U. S., 320."

"It may be said in a general way that the police power extends to all the great public needs. Canfield v. U. S., 167 U. S., 518. It may be better for the aid of what is sanctioned by usage or held by the prevailing morality or strong preponderant opinion to be greatly and immediately necessary to the public wellfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce."

Noble St. Bank v. Haskell, 219 U. S., 104, 111.

19. SECOND POINT OF PLAINTIFF IN ERROR.

On page 45 of the brief of the plaintiff in error counsel take the position that the plaintiff was not entitled to injunctive relief because the plaintiff did not own the "waterpower proposition" claimed by it. We have heard and read the discussion of plaintiff's counsel concerning this "waterpower proposition" on several previous occasions. To us it is rather an ethereal proposition. We confess we never have been able to see what they mean by "waterpower proposition." The reading of this record shows that the defendant in error was authorized to make hydro-electric developments, to build dams for other public works. The jury have found by the verdict, that the defendant had its works surveyed and staked out on the ground, and had plats or maps made thereof and filed the same in the office of the Clerk of the Court in the County where the land lies according to its charter, and duly adopted by appropriate corporate action these loca-

tions for its dams and public works, and had not abandoned the same, and the evidence showed that the defendant in error had acquired more than fifty per cent. of the property necessary for its development, and there was ample proof to sustain all these findings, and under the verdict of the jury we are unable to see what is meant by the alleged lack of ownership of the "waterpower proposition." The defendant in error owns the lands, made the surveys, adopted the plans, and is proceeding to make the developments, and under those circumstances we do not see that it makes much difference who owns that thing called the "proposition" referred to in the brief of the plaintiff in error.

20. THIRD POINT OF PLAINTIFF IN ERROR.

Counsel for the plaintiff in error in their brief, page 56, state: "The evidence disclosed that the plaintiff Company had never located any dam sites or made any locations for power plants on the Hiawassee River." The trouble with this argument is that it is not true as a matter of fact. The jury found by their verdict (record page 48) that the defendant in error had done the very things the plaintiff in error says it never had done, and the Supreme Court of North Carolina affirmed the judgment upon the evidence set out in the record. We will, therefore, not argue this question at all. In fact, the plaintiff in error admitted in the trial court that the locations for the dams of the defendant in error had been surveyed and staked out by the defendant in error. This appears from the answer to Issue No. 1. Plaintiff in error argues that the public works of the defendant was surveyed and staked out by a construction company. The undisputed evidence showed that the defendant in error employed a construction company to make all the developments. That the Construction Company employed the Ambursen Hydraulic Company to do the surveying and Ambursen Company employed one T. H. Verdell to perform the work and T. H. Verdell swore that he did perform it. Yet, in view of this undisputed testimony the

plaintiff still insists that the defendant made no surveys of its location. This point certainly needs no further elaboration.

21. FOURTH POINT OF PLAINTIFF IN ERROR.

Counsel for plaintiff in error in their brief, page 59, take the position that there was no evidence that the maps or plats of the works of the defendant in error were filed with the Clerk of the Superior Court. The great trouble with this position is also that it is not true in fact. Two witnesses (record pages 90 and 116) swore positively that they deposited, or filed, the maps in the office of the Clerk of the Superior Court of Cherokee County, on the 21st day of June, 1911, and the jury found by their verdict (record page 48) that these witnessess swore the truth. The Supreme Court of North Carolina affirmed this finding. This was purely a question of local law and a question of fact over which this court has no jurisdiction.

22. FIFTH POINT OF PLAINTIFF IN ERROR.

Counsel for plaintiff in error in their brief (record page 56) take the position that the defendant in error had abandoned its proposed public works. This question was submitted to a jury and found against the plaintiff in error. It was reviewed in the Supreme Court of North Carolina and that Court held that there was ample evidence to sustain the verdict of the jury. The Court also held that the instructions of the Judge to the jury upon the question of abandonment, as well as upon all other questions, were correct.

23. SIXTH POINT OF PLAINTIFF IN ERROR.

Counsel for the plaintiff in error on page 69 of their brief, take the position that the defendant in error is only a riparian land owner. A considerable portion of the brief is devoted to this argument. This, of course, is purely a local question—a question of State law. It was disposed of in the decision in this case in the Supreme Court of North Carolina (Power Co. v. Power Co., 175

N. C., 579; see record page 279). The position of the plaintiff in error on this question simply amounts to saying that the Legislature of North Carolina cannot grant to a corporation engaged in public service the power of eminent domain. Their position would repeal the law of eminent domain. There is no authority for any such position either in North Carolina or elsewhere.

24. SEVENTH POINT OF PLAINTIFF IN ERROR.

Counsel for plaintiff in error complain that injunction should not have been granted because no tender of compensation was made to the plaintiff in error in this case. This action is not a condemnation proceeding, but is one brought to determine which of the parties has the prior right to develop the waterpower of this river.

Power Co. v. Power Co., 171 N. C., 248, 257.
Power Co. v. Power Co., 175 N. C., 668, 679.

The case of Telluride Power Co. v. Rio Grande R. R. Co., 175 N. C., 639, is exactly similar to this proceeding. Of course, in the event the defendant in error is unable to purchase the property of the plaintiff in error for its proposed public works, it will bring a condemnation proceeding against the plaintiff in error, and in that condemnation proceeding, as provided by laws of North Carolina, it will be required to pay the plaintiff in error such damages as it may sustain by reason of such taking of its property. This is expressly provided for under the general laws of North Carolina and under the charter of the defendant company. (Record page 209-211).

Again, this question also is one purely of local or State law, and this Honorable Court will not undertake to review the same.

25. EIGHTH POINT OF PLAINTIFF IN ERROR.

On page 89 of the brief of plaintiff in error, it is insisted that an injunction should not have been granted in this case. This position we think is sufficiently answered by reference to the decision of the Supreme Court of North Carolina.

Power Co. v. Power Co., 175 N. C., 681-686.
Telluride Power Co. v. Rio Grande R. R. Co., 175 U. S., 639-641.

26. NINTH POINT OF PLAINTIFF IN ERROR.

The other points presented in brief of plaintiff in error are attempts to point out errors of law in the instructions given by the trial judge to the jury, and in the decision of the Supreme Court of North Carolina, concerning questions of local law, which we insist this Court has no power to review, but which we insist were rightly decided in any event.

27. LOCATING PUBLIC WORKS.

Plaintiff in error insists there was no evidence that the defendant Company had located any public works on the Hiawassee River. To this we think there are three answers: First, the record contains ample testimony to the effect that the defendant made the surveys and locations for its dams and plants on the Hiawassee River. It employed Carolina Construction Corporation to do the surveying, build the dams, power houses, etc. (record pages 218-225). The Construction Corporation employed the Ambursen Hydraulic Company to do the surveying and certain other work (record pages 226-230). The Ambursen Company put T. H. Verdell in charge and he did the work (record pages 79 to 83), and the defendant company paid the expenses thereof (record page 56); second, it makes very little or no difference who did the surveying, measuring and planning for the work as those surveys were adopted and made the plaintiff's own by its proceedings, and the evidence clearly shows that this was done; third, the plaintiff in error agreed that the first issue which raised the question as to whether the surveys had been made and locations marked out by the plaintiff as alleged in the complaint, should be answered in the affirmative; it was alleged in the complaint that the plaintiff, defendant in error here, had made the surveys, and it follows notwithstanding the ingenuous argument to the contrary, that the plaintiff in error agreed on the trial in the Superior Court that the work had been done by the defendant in error. The law concerning the acquisition of locations for public works was settled in this case. (Power Co. v. Power Co., 171 N. C., 248; Street Railway Co. v. R. R., 142 N. C., 423).

The charter of the plaintiff Company, Section 8, (record page 209) provides: "And when the location of said works shall have been determined and a survey of the same deposited in the office of the Clerk of the Superior Court of the County in which said land lies, then it shall be lawful for said Company by its officers, agents, engineers, superintendents, contractors and others in its employ to enter upon, take possession of, have, hold, use and excavate and fill such lands and to erect all necessary and suitable structures for the erection, completion, repairing, and operating of said works, subject to such compensation as is hereinafter provided."

As between two rival railroad companies, each claiming the right of way on the same route over public lands, under the statute that one is prior in right which first definitely adopts the line on which his road is to be built by appropriate corporate action, and then files its maps of the location so adopted, since that is an essential act to initiate any right to a particular location.

Utah N. & C. R. R. Co. v. Utah & C. Ry. Co., 110 Fed., 879.

The making by the chief engineer of a survey and map and the marking of the proposed line by pins at irregular intervals indicating the center line of the track, the curves being run in and marked, but the cuts and fills not being indicated in any way, and the subsequent authorization by the directors to construct along this way, was held a sufficient location to prevent another road obtaining that route, although nothing further was actually done toward the construction.

Pittsburg & C. Ry. Co. v. Pittsburg & C. and S. L. Ry Co., 159 Pa., 331; 28 Atlantic, 155.

The Supreme Court of Indiana in one case says: "We are, however, impressed with the view, since railroad corporations are authorized to acquire title by negotiation for right of way purposes, and since condemnation in such a case is wholly unnecessary, and as the map and profile may be filed at any time before the construction, that, as to its own lands and possibly as to other lands, as against rival corporations, the filing of the map

and profile should be considered as such inchoate appropriation of the property for public purposes as to prevent, in the absence of undue delay, an appropriation of it by another company."

Southern Indiana Ry. Co. v Indianapolis, etc., Co., 13 L. R. A. (N. S.), 197.

Where a railroad company surveys its line of railroad and locates the same as provided by its charter, it acquires a superior right over its entire route so surveyed and located.

Barre Co. v. Montpelier, etc., Co., 4 L. R. A., 785.

On a question of location between two rival companies, that which first made a survey and staked out its right of way is entitled to a priority of right.

New Brighton, etc., Co. v. Pittsburg, etc., Co., 105 Pa., 13.

Davis v. Titusville, etc., Co., 114 Pa., 308.

In the last case the location was made in 1870-71 and the road partly graded. Nothing further was done for many years, but the Court held that the locating was sufficient and that a present and subsequent lessee of lands on which the location had been made acquired no rights.

In the case of *Morris and Essex R. R. Co. v. Blair*, 9 N. J. Eq., it was held that a survey previously made by an individual and adopted by a corporation afterwards organized and then filed and recorded, took effect from such filing and recording.

Atlanta K. & N. Railway Company v. Southern Railway Company, 131 Fed., 657; 66 "C. C. A.," 601.

The bringing of a condemnation proceeding by one railroad company over a tract of land previously acquired by another railway company for the purpose of a right of way, although the deed to the latter railway company has not been put to record, does not give a priority to the railway company which instituted the condemnation proceedings, under the Tennessee statute which provides that such proceeding shall effect only the interest of the parties thereto and unborn remaindermen, the grantee company not being a party.

Section 1574 of the Revisal of 1905 provides "that only the interest of such parties as are brought before the Court shall be condemned in any such proceeding."

A proceeding to compel an appropriation is at least but a substitute for *an acquisition by contact* and no *superior equity is acquired by the institution of a suit for the purpose of condemnation over a prior agreement* for the acquisition of the same interest valid between the parties, especially when its prior rights are known to the petitioner when he started his proceedings.

"Treating the question as one of priority between mere equities and each as equally innocent, the claimant first in order of time has by virtue of that circumstance the better right. He who is superior in time, in the absence of some higher equity, has by virtue of that circumstance alone the better right to the matter in dispute."

M. & S. P. R. Co. v. Chicago, M. & S. P. R. Co., 88 N. W., 1082.

Knowledge of the existence of a contract for a right of way over a tract of land at the time of the institution of the condemnation proceeding puts the party instituting such proceeding on notice of the prior right of the grantee in the contract, and the fact that the contract was not on record or in writing is of no importance.

Sioux City & D. M. Ry. Co. v. Chicago, M. & St. P. Railway Co., 27 Fed., 770.

The complainant was a corporation created for the purpose of building a railway from Sioux City to Des Moines, the construction of which had been commenced. The defendant desired to condemn a right of way over the premises described in the bill for the purpose of building a road from Sioux City to Defiance. Defendant, on the 19th of April, 1886, instituted condemnation proceedings over the premises. The complaint in the month of October, 1885, as it alleged, had located its line of road, surveyed the same over the land described in the bill for the purpose and with the intent of constructing the same, and it had commenced the construction over a part of the land; that it had also prior to the commencement of the condemnation proceedings purchased from the owners

certain tracts of land for its right of way, and that when it became evident that the complainant intended to construct its road the defendant instituted condemnation proceedings. Injuncion was sought. The facts are stated as follows:

"The Chicago, Milwaukee and St. Paul Railway Company, in its answer to said bill, avers that for several years past the defendant company has had in contemplation the construction of a line of railway from Sioux City to Defiance, thus connecting its system of railway in Dakota with its through line from Council Bluffs to Chicago; that in pursuance of such plan, in the summer of 1881, it caused surveys to be made for such line, and in the fall of 1881 it located the same; that in the year 1883 it procured, by ordinance duly passed, the right to lay a double track along Second street, in said Sioux City, to the eastern limits of the city, and did, during that year, construct its track easterly along said street to within a few feet of the eastern corporate limits of said city, the same being done as the commencement of its said line to Defiance; that in October, 1884, it purchased 15 lots in Felt's addition to Sioux City, lying next east of the city limits, in direct line with the location of defendant's road, and did also purchase of said Felt a piece of land contiguous to and bounded by said lots and extending to the middle of the Floyd River, the same being purchased so as to secure the right of way for the construction of said line to Defiance; that in June, 1885, it retraced its located line and permanently located the same between Sioux City and Defiance, the same being marked with stakes driven in the center of the line at a distance of 100 feet, and that defendant's line over all the premises in the bill described was permanently located in June, 1885; that, having decided to immediately construct said Defiance line, it did, on the morning of the 15th day of April, 1886, commence to negotiate and contract for the right of way along said line obtaining by purchase such right of way over certain premises set forth in the answer; admits that on the 19th of April, 1886, at its request, commissioners for the appraisal of damages were appointed; and further avers that complainant well knew that defendant was intending

to construct its located line from Sioux City to Defiance, and had commenced procuring the right of way, and that, in fraud of the rights of defendant and in some cases by misrepresentations, complainant procured conveyances of the premises and right of way in the bill described, but that the same were not procured until after the defendant company had initiated proceedings in condemnation."

The question presented was, which railway company had the prior right? The Court says:

"It is certainly *equitable that a company which in good faith surveys and locates a line of railway, and pays the expense thereof,* should have a prior claim for the right of way for at least a reasonable length of time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right and better equity. The right to the use of the right of way is a public not a private right. It is, in fact, a grant from the State, and although the payment of the damages to the owner is a necessary prerequisite, the State may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement. The owner can not, by conveying the right of way to A, thereby prevent the State from granting the right to B, and, subject to the right of compensation to the owner, the State has the contral over the right of way, and can, by statute, prescribe when and by what acts the right thereto shall vest, and also what shall constitute an abandonment of such right."

The Court further says that when a railroad company has ascertained and located where its road shall be, it is not competent for another company to step in and take its route, agree with the owners and occupy the land. The injustice and injury to private and public rights which would arise were it held that after the company has duly surveyed and located its line of railway and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the rights of way over parts of the located line and prevent the construction of the road, is a strong reason for holding that the first location, if made

in good faith and followed up with reasonable diligence, may confer a prior right, even though a rival company may have secured the conveyance of the right of way by purchase from the property owners after the location but before the commencement of the condemnation proceedings.

Cumberland Railroad Company v. Pine Mountain Railroad Company, and *Pine Mountain Railroad Company v. Cumberland Railroad Company,* 96 Southwestern, 199.

These were actions decided in the Supreme Court of Kentucky. Each of the actions was brought by each of the parties against the other to enjoin the defendant in each case from acquiring a right of way for a railroad over the location claimed by the plaintiff in each case.

1st. Where a railroad company had full notice of a prior survey at the time it attempted to make a similar survey over the same route, it was immaterial to the priority of the company making the first survey that it did not first file for record a map of its location as required by the Kentucky statute.

2d. Where a railroad has actually located its right of way and is in good faith following up its location by buying land or instituting condemnation proceedings with reasonable diligence, another company can not go to a point on the route which is neither the beginning nor the end of its proposed line and locate a right of way on the same line.

In this case the Cumberland Railroad Company made a survey over the disputed ground first, but the Pine Mountain Company as it went along made maps of its route as located and filed the same in the office of the Clerk of the Court, and this company by action of its board of directors adopted the route so selected. The Cumberland company filed its map also, but after the map of the Pine Mountain company had been filed. *"There was no express action of the directors of the Cumberland company approving the location of the route as made by its engineers, but as they went along it took deeds for the right of way from such persons as were willing to sell and instituted proceedings to condemn the lands of those*

with whom it could make no contract. The Pine Mountain company took like deeds and instituted like proceedings."

The Court concludes as follows:

"The purpose of requiring a map to be filed under section 767, Ky., St. 1903, is to give notice of the location of the right of way. The map, when properly lodged for record, is constructive notice, just as a deed properly lodged for record; but if a person has actual notice of the location of the right of way, the fact that the map was not filed can not be relied on by him. When the engineers of the Pine Mountain Railroad Company went to Greasy Gap and began their work the right of way of the Cumberland Railroad Company had been located through this territory four days before. The stakes were on the ground, the tents of the surveying party were to be seen, and the Pine Mountain company had full notice of the situation when it undertook to begin its survey at this point in the middle of its proposed line. We therefore conclude that the fact that the map of the Cumberland Railroad Company was not filed is not material, and that it is also immaterial that the Pine Mountain company first filed its map. *When a company has actually located its right of way, and is in good faith following up its location by buying the land or instituting proceedings to condemn it with reasonable diligence,* another company can not go to a point on the route which is neither the beginning nor the ending of its proposed line and run a race with the company which has begun at the beginning of its route and is going on in an orderly way to its other terminus. The railroad company is authorized to take land under eminent domain, and when it has in good faith entered for this purpose, located its right of way and is proceeding to perfect its right, the law prefers him who thus first enters in good faith, and it can not be permitted that another company with notice of his rights shall make another survey right behind him and destroy his priority which he has thus gained. While it is true that on some days the Pine Mountain company's engineers were ahead of the Cumberland company's engineers, they got thus ahead by beginning in the middle of the line and then running a race with the other people. The statute does

not contemplate this. It contemplates a location in good faith and in the usual course of business.

"Under all the circumstances we conclude that the Cumberland company has the better right. The motion to discharge the injunction granted to it is overruled. The motion to discharge the injunction granted in favor of the Pine Mountain Railroad Company is sustained, and that injunction is dissolved."

Milwaukee, L. H. & T. Co. v. Milwaukee Northern R. Co., 132 Wis., 313 (1907); 112 N. W., 663.

P made a tentative survey route beginning September, 1903; completed its field notes in 1905; completed its maps January 16, 1906; adopted route January 16, 1906, and began condemnation suit February 15, 1906.

D's promoters *began survey in October,* 1905, *and at same time took options.* October 25, 1905, D organized *and immediately authorized officers to acquire right of way franchises and appropriate money. Survey completed November,* 1905, *and nine miles of the route surveyed conflicted with P's route.* Prior to January 16, 1906, D had taken over the options acquired by its promoters but had not acquired title to any of its rights of way nor had entered into binding contracts for the acquisition of such.

The Court held that the P had made no valid location prior to January 16, 1906, and that prior to that time the defendant had made a location and was entitled to priority. *It held that the adoption of a route was evidenced by the acts of the D before January* 16, *and that such acts were sufficient to take the place of a formal adoption.*

The Court said, page 355, referring to the acts evidencing the intention to adopt the route:

"It is plain, however, that it must be a determination made with the present intention in good faith to locate the line upon that route and construct the same with reasonable diligence."

2 Eliot on Railroads, sec. 927.

"When a proposed line has been regularly located and staked off, and the expense thereof has been paid, the

corporation by which it is done has a prior claim to the right of way for a reasonable time, which can not be defeated by another company that procures voluntary conveyances from the owners before the proceedings in condemnation instituted by the first company have terminated."

Denver and R. G. Ry. Co. v. Alling, 99 U. S., 463.

In 1871-1872 the Denver company made a close preliminary survey of its line through a canon. No work was done in building its line through the canon until April 19, 1878. The Canon City Company was incorporated in 1877 and its plans and locations were approved by the Secretary of the Interior in the same year. Its plans contemplated the construction of its road through the same canon. It attempted to commence work on April 20, 1878. Each company brought an action to restrain the other. For the Canon City Company it was contended (page 477) that the Denver company

> "had lost whatever rights it acquired in the canon through the imperfect survey of 1871 and 1872 by its long inaction after the construction of the road to Canon City, and by its failure, within a reasonable period, to follow up those surveys by actual location and occupancy for railroad purposes. The conduct of the Denver company, it is urged, evinced a settled purpose upon its part to abandon its grant of a right of way through that canon. The answer to all this seems very obvious.
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> "Nor had they sufficient reason to suppose that the Denver company had finally abandoned its purpose of constructing a road through the canon. We have already referred to the completion of the road from Denver to Pueblo, and from Pueblo to Canon City, by July, 1875. In 1873 the Denver company commenced the construction of one of its branches—the Denver and Southern Railway. Commencing at Pueblo, it completed that road to Cucharas, fifty miles from Pueblo, by February, 1876; to Garland, sixty

miles from there, by August, 1877; and to the valley of the Rio Grande, by July, 1878. After July, 1875, the company, it is true, suspended active work upon the line west of Canon City. But the cause of such suspension, as its officers testify, was the widespread depression in business and financial circles, and the belief, shared by all interested in the prosperity of the company, that the extension of the line southward from Pueblo gave promise of quicker returns and more immediate results in every way. *They state that it was the purpose of the company to resume work upon its line through the canon as soon as the necessary means therefor could be obtained, and that there was no intention at any time to abandon the route west of Canon City.* Their delay in the construction of the road west of Canon City and through the Grand Canon seems to have been in the interest of the stockholders they represented, and not inconsistent with an honest purpose, within the period fixed by law, to meet the objects for which Congress granted to it the right of way. Its surveys of 1871-72, followed by an occupancy of the canon on the 19th of April, 1878, in advance of the Canon City Company, for the purpose of constructing its road through that defile, was, in our judgment, a final appropriation of the way granted by Congress. The Denver company then, if not before, came into the enjoyment of the present beneficial easement conferred by the act of June 8, 1872, and was entitled to have secured against all intruders whatever privileges or advantages belonged to that position."

3. Formal Action by Resolution of Directors Not Necessary.

From an examination of several of the foregoing authorities it will be seen that no formal resolution of the corporation is necessary to adopt a location. In our case there were formal resolutions, to wit, those of May 28,

1909, and in fact the resolutions of August 17, 1914, were prior to the commencement of the action and would be sufficient for the purposes of this suit; but, as above stated, in a number of cases it has been held that decisive, definite corporate acts showing the adoption of the locations by the company is sufficient. Here we have surveys made, the maps approved by the company and filed for record, a large number of tracts of land purchased calling for the dam sites as located on the maps and for the contour lines of the dams, a large amount of money spent and all of the acts and things set forth in the statement of facts and the testimony in this case which were done by the plaintiff in State court.

In the case of *Cumberland Railroad Company v. Pine Mountain Railroad Co.,* 96 Southwestern, 199, the Court says:

"There was no express action of the directors of the Cumberland company approving the location of the route as made by its engineers, but as they went along it took deeds for the right of way from such persons as were willing to sell and instituted proceedings to condemn the lands of those with whom it could make no contract."

These acts on the part of the company were held to be sufficiently definite and decisive to show its purpose to make the developments. Again, in the same case, the Court says:

"When the company has actually located its right of way, and is in good faith following up its location by buying the land and instituting proceedings to condemn it with reasonable diligence, another company can not go to a point on the route, which is neither the beginning nor the end of its proposed line, and run a race with the company which has begun at the beginning of its route and is going on in an orderly way to its other terminus."

See also Eliott on Railroads, sec. 927.

The Supreme Court of Wisconsin, in the case *In re Milwaukee Light, Heat and Traction Co.,* 112 Northwestern, p. 663, says:

"In such case the prize would go to the company which first secured a completed location. So it appears that prior to January 16, 1906, the respondent company

had made or adopted a fully completed survey over the disputed lands, and determined in good faith to build its railroad thereon, had secured all the necessary franchises and crossing privileges from towns and villages, and had obtained option contracts on all but a very small fraction of said lands, and intended in good faith to utilize such options and take deeds of the lands at an early date. These are very decisive acts, and unless it be necessary that it should have actually secured deeds or binding contracts to purchase the lands, these acts must be held to constitute a completed location, so far at least as to give precedence in a contest with a rival company seeking to obtain the same lands. Certainly it was not necessary that it should have paid for the lands or secured deeds. As to all the world except the owner, the appropriation of land for railroad purposes may be complete without either of these steps, and the only question then is whether it was necessary that it should have bound itself by contract to purchase the lands. We think not. The essential requirement is, not that there should be a completed purchase, but that there should be a decisive corporate action taken in good faith locating the route and committing the corporation to that route, though not necessarily irrevocably. The securing of option contracts over practically the whole line surveyed, with the bona fide intention of utilizing them and completing the purchases and building the line, must be held to be such a decisive act, and we therefore hold that the petition for condemnation was properly denied."

Where all stockholders acquiesce in a proceeding no formal vote is necessary.

Benbow v. Cook, 115 N. C., 325, 331.
In re Griffin Iron Co., 41 Atl., 933.
Hill v. R. R., 143 N. C., 539, 554, 556.

See also the note to the case of *Fayetteville Street Ry. Co. v. Railway Co.*, as reported in 9 Ann. Cases, p. 689, where a large number of cases are cited bearing on the question involved.

"A survey staked out upon the ground as the center line, a preliminary line, or an actual location, whether delineated on paper or not, if adopted by the corporation,

is the location giving the company first making such location a right superior to that of any other company."

Chesapeake, etc., Ry. Co. v. Deep Water R. Co., 57 W. Va., 641; 50 Southeastern, 859.

The first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative action."

Fayetteville St. Ry. Co. v. Railway Co., 142 N. C., 423.

Rochester, etc., Co. v. New York, etc., R. Co., 110 N. Y., 128.

4. Water-Power Company.

A very thorough examination of the authorities has enabled us to find two cases decided prior to the present controversy which adopt the foregoing principles to their fullest extent in their application to the location for water-power developments. Both of these cases are to be found in the California Reports.

By this Court it was held that if a water-power company start proceedings under the statute to get a title after like proceedings for acquiring title have been commenced by another company, and there is a condemnation and payment in both proceedings, as between the companies, the lands belong to the one over whose proceedings the Court first acquired jurisdiction.

Lake Merced Water Co. v. Cowles, 31 Cal., 215.

Where a water-power company located its works on a stream and acquired by negotiations with the owners lands on which it built a small plant, it was held that a company subsequently endeavoring to secure the same property by compulsory proceedings could not do so.

San Francisco, etc., Water Co. v. Almeda Water Co., 36 Cal., 639.

The facts were as follows: Two corporations were organized for the purpose of supplying water to the city and county of San Francisco. Respondent immediately after its certificate of incorporation had been filed, that is, between June 6 and June 20, 1865, purchased and entered into the possession of 160 acres of land in Alameda County, in Alameda Canon, on Alameda Creek, and

erected dams thereon as the initiative of its works for diverting and appropriating *all the waters of said creek above said dams.* Thereafter, on the 24th of June, 1865, while respondent was so in actual possession of its lands and dams thereon, and engaged in the construction of works necessary to the complete appropriation of the waters of the stream, the appellant instituted proceedings before the County Court to condemn the waters of Alameda Creek which extended through the lands of the respondent and much other lands on Alameda Creek which had not been acquired by the respondent. The Court decided in favor of the respondent and held that it was entitled to appropriate all the waters of Alameda Creek by reason of its prior location, and says in the conclusion of the opinion:

"Respondent therein having, prior to the institution of appellant's proceedings to condemn, secured essential property rights in the premises thereby sought to be condemned by successful negotiations and the construction of works necessary to the appropriation of the waters to accomplish all the business of its incorporation, we can discover no just grounds for subordinating its rights thus acquired to the subsequent effort of appellant to acquire the same property for similar purposes by compulsory process of acquisition."

CONCLUSION

The other questions attempted to be raised by the brief and argument of counsel for the plaintiff in error, are plainly questions of State law over which this Court has no jurisdiction. The questions thus referred to are the questions of abandonment by the defendant in error of its location for its public works, the question of competency as evidence of certain deeds of conveyance taken by the plaintiff in error for some of the lands claimed by it, after this action was brought in the Superior Court of Cherokee County, North Carolina, and the question of the instructions of the Judge to the jury on the law concerning the acquisition of locations for public works, and the law of abandonment. An examination of the opinion

of the Supreme Court of North Carolina will show that these questions were all fully considered by the Supreme Court of North Carolina, and all of the objections to the testimony and the charge of the Court overruled. A further examination of the authorities bearing on these several questions will show plainly that the Supreme Court of North Carolina committed no error in its holdings.

This controversy has been pending for a number of years. The jury by their verdict (record page 48) found all of the facts in favor of the defendant in error, finding that in accordance with the laws of North Carolina it had surveyed, staked out, and located its public works, and had duly adopted said locations by authoritative corporate action, and that it had duly filed its plats and surveys of said locations as required by the terms of its charter, and that it had not abandoned its proposed locations, and under the laws of North Carolina this finding by the jury entitled the defendant in error to proceed without interference or interruption to the building of its public works.

The jury further found that the locations claimed by the plaintiff in error had been surveyed and staked out prior to the organization of the plaintiff in error Corporation. This finding was made by consent, but the jury further found that the plaintiff in error had not adopted said locations for its public works and therefore the plaintiff in error was left in the same position as any other property holder along the water course where the public works are to be established. The finding by the jury that the defendant in error had duly adopted said locations withdrew the property thus covered by the proposed improvements of the defendant in error from occupancy by any other like corporation. It is impossible that both companies should develop the same water powers at the same time. The Court in order to protect the prior rights of the defendant in error, enjoined the plaintiff in error from further interference. The decision was clearly right and clearly in accordance with the law, as laid down in numerous decisions cited in this brief.

We therefore submit the following as conclusions:

1. Writ of Error should be dismissed for want of jurisdiction in this Honorable Court.

2. If the writ of error is not dismissed then the judgment should be affirmed on the record, as no errors of any kind have been pointed out, and especially have no errors been pointed out of which this Court has jurisdiction.

This January 5th, 1920.

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